

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

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4 CORNELE A. OVERSTREET, Regional  
5 Director of the Twenty-Eighth Region of  
6 the National Labor Relations Board, for  
and on behalf of the National Labor  
Relations Board,

7 Plaintiff,

8 v.

9 APEX LINEN SERVICE INC.,

10 Defendant.  
11

Case No. 2:17-cv-02923-APG-CWH

**ORDER GRANTING IN PART  
PETITION FOR TEMPORARY  
INJUNCTION**

(ECF No. 1)

12 Petitioner Cornele Overstreet, Regional Director for the National Labor Relations Board  
13 (NLRB or Board), filed a petition for a temporary injunction against respondent Apex Linen  
14 Service, Inc. under § 10(j) of the National Labor Relations Act (NLRA). ECF No. 1. Apex  
15 operates a laundry business in Las Vegas providing service for commercial entities like hotels and  
16 restaurants. ECF Nos. 1-2 at 2; 29-1 at 30-31. It employs engineers to maintain equipment. ECF  
17 Nos. 1-2 at 2; 29-1 at 34. On January 24, 2017, the International Union of Operating Engineers  
18 Local 501, AFL-CIO petitioned for a vote to become the exclusive bargaining representative for  
19 the engineers. ECF No. 1-1 at 139. The vote was held on February 6, and the engineers voted in  
20 favor of the union by a vote of 10 to 4. *Id.* at 56, 104, 143; ECF No. 1-2 at 10. This was the first  
21 time a union represented employees at Apex. ECF No. 29-1 at 41. The dispute in this case  
22 concerns events leading up to and following the vote.

23 Starting in February 2017 and through July 2017, the union filed numerous charges with  
24 the NLRB alleging Apex had engaged in unfair labor practices. The NLRB consolidated those  
25 charges into a complaint against Apex. Apex filed an answer, and that matter is proceeding  
26 before an administrative law judge (ALJ), who will make recommendations to the Board.

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1 In the meantime, NLRB Regional Director Overstreet petitions for this court to enter a  
2 temporary injunction under § 10(j) of the NLRA against Apex arising out of Apex's alleged  
3 unfair labor practices. Section 10(j) provides:

4 The Board shall have power, upon issuance of a complaint as provided in  
5 subsection (b) charging that any person has engaged in or is engaging in an unfair  
6 labor practice, to petition any United States district court, within any district  
7 wherein the unfair labor practice in question is alleged to have occurred or wherein  
8 such person resides or transacts business, for appropriate temporary relief or  
restraining order. Upon the filing of any such petition the court shall cause notice  
thereof to be served upon such person, and thereupon shall have jurisdiction to  
grant to the Board such temporary relief or restraining order as it deems just and  
proper.

9 29 U.S.C. § 160(j). In determining whether temporary relief is just and proper under the  
10 circumstances, I “consider the traditional equitable criteria used in deciding whether to grant a  
11 preliminary injunction.” *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1187 (9th Cir. 2011)  
12 (quotation omitted). Those criteria are: (1) a likelihood of success on the merits, (2) a likelihood  
13 of irreparable harm, (3) the balance of hardships favors the plaintiff, and (4) an injunction is in the  
14 public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Alternatively, under  
15 the sliding scale approach, the party seeking injunctive relief must demonstrate (1) serious  
16 questions on the merits, (2) a likelihood of irreparable harm, (3) the balance of hardships tips  
17 sharply in the moving party's favor, and (4) an injunction is in the public interest. *All. for the Wild*  
18 *Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

19 In applying these criteria, I am cognizant that the availability of injunctive relief in this  
20 context is designed “to protect the integrity of the collective bargaining process and to preserve  
21 the [NLRB's] remedial power while it processes the charge.” *Avanti Health Sys., LLC*, 661 F.3d  
22 at 1187 (quotation omitted). The remedy is meant to prevent someone from accomplishing an  
23 unlawful objective based on the delay between the unfair labor practice and final resolution of the  
24 complaint process. *See Miller for & on Behalf of N.L.R.B. v. Cal. Pac. Med. Ctr.*, 19 F.3d 449,  
25 455 n.3 (9th Cir. 1994) (en banc).

26 The fact that the NLRB exercised its discretion to seek a § 10(j) injunction does not mean  
27 I must defer to the Board in deciding whether interim relief is appropriate. *Small v. Operative*  
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1 *Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO*, 611 F.3d 483, 490 (9th Cir.  
2 2010). However, I “should evaluate the probabilities of the complaining party prevailing in light  
3 of the fact that ultimately, the Board’s determination on the merits will be given considerable  
4 deference.” *Id.* (quotation omitted).

### 5 **I. Likelihood of Success on the Merits**

6 To show a likelihood of success on the merits in a § 10(j) proceeding, the Regional  
7 Director must show a “probability that the Board will issue an order determining that the unfair  
8 labor practices alleged by the Regional Director occurred and that this Court would grant a  
9 petition enforcing that order, if such enforcement were sought.” *Frankl ex rel. N.L.R.B. v. HTH*  
10 *Corp.*, 693 F.3d 1051, 1062 (9th Cir. 2012) (quotation omitted). The Regional Director meets  
11 this burden by making a “threshold showing of likelihood of success by producing some evidence  
12 to support the unfair labor practice charge, together with an arguable legal theory.” *Avanti Health*  
13 *Sys., LLC*, 661 F.3d at 1187 (quotation omitted). “Conflicting evidence in the record does not  
14 preclude the Regional Director from making the requisite showing for a section 10(j) injunction.”  
15 *HTH Corp.*, 693 F.3d at 1063 (quotation omitted).

16 Where, as here,<sup>1</sup> the Regional Director “seeks and receives approval from the NLRB  
17 before filing a § 10(j) petition, the Director is owed special deference because likelihood of  
18 success is a function of the probability that the Board will issue an order determining that the  
19 unfair labor practices alleged by the Regional Director occurred.” *Avanti Health Sys., LLC*, 661  
20 F.3d at 1187 (quotation omitted). “That the NLRB itself decid[ed] to file a Section 10(j) petition  
21 might signal its future decision on the merits, assuming the facts alleged in the petition withstand  
22 examination at trial.” *Id.* (quotation omitted).

#### 23 **A. Section 8(a)(1)**

24 Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to  
25 “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section  
26 157 of this title.” 29 U.S.C. § 158(a)(1). Section 157 gives employees “the right to self-

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28 <sup>1</sup> The Board approved the § 10(j) petition on October 27, 2017. ECF No. 9 at 4.

1 organization, to form, join, or assist labor organizations, to bargain collectively through  
2 representatives of their own choosing, and to engage in other concerted activities for the purpose  
3 of collective bargaining or other mutual aid or protection . . . .” *Id.* § 157.

4 Overstreet asserts that Apex violated this section through three sets of acts: (1) Apex chief  
5 engineer Eugene Sharron interrogated employees about their support for the union, stated he  
6 would call employees to discover whether they supported the union, informed employees Apex  
7 suspected certain employees supported the union, and told employees the union would not do  
8 anything for them except take their money; (2) Apex chief executive officer and part owner  
9 Joseph Dramise told employees their wages would be reduced and schedules would no longer be  
10 honored if the union came in; and (3) Apex chief operating officer and part owner Marty Martin  
11 (Marty)<sup>2</sup> denied engineer Adam Arellano (who participated in bringing the union into Apex) his  
12 right to a union representative during an interview that Arellano reasonably believed might result  
13 in discipline.

14 *1. Sharron’s Statements and Questioning of Employees*

15 After Apex learned of the union organizing effort, Marty sent Sharron to find out if there  
16 was genuine interest amongst the engineers in voting for the union. ECF No. 29-1 at 219-20. On  
17 January 24, 2017, Sharron, who is responsible for supervising the engineers, spoke to Apex  
18 engineer Joseph Servin. *Id.* at 53, 367-68, 530-31. According to Servin, Sharron asked him if he  
19 knew anything about the union forcing its way into Apex. ECF Nos. 1-1 at 142; 29-1 at 530-31.  
20 Fearing retaliation and possible termination before the union election, Servin stated he did not  
21 know anything about it. ECF Nos. 1-1 at 142; 29-1 at 531-32. According to Servin, Sharron told  
22 him that if the union came in, it would do nothing for him except take his money. ECF Nos. 1-1 at  
23 142; 29-1 at 532. Sharron asked Servin if he knew how he would be voting and Servin  
24 (inaccurately) said he did not know because it was all news to him. ECF Nos. 1-1 at 142; 29-1 at  
25 530-32.

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27 <sup>2</sup> By coincidence, Apex’s chief operating officer and the union’s representative, Charles “Ed”  
28 Martin, share the same last name. I therefore refer to Marty Martin as Marty, and Ed Martin as Ed.

1 The next day, Sharron approached Arellano and asked if the engineers wanted a union.  
2 ECF Nos. 1-1 at 149-50; 29-1 at 493. Arellano replied that he came from a union company, but  
3 he did not say anything else. ECF Nos. 1-1 at 150; 29-1 at 493. Sharron responded that he came  
4 from a union company too but that he did not want the union, that the union was trying to force its  
5 way in, and that he was going to call everyone to see if they wanted the union to represent them.  
6 ECF Nos. 1-1 at 150; 29-1 at 493. Sharron denies that he told Arellano or Servin that he was  
7 going to call the other engineers, but Sharron did call the other engineers, who all stated they  
8 were going to vote no. ECF No. 29-1 at 368-70. Sharron reported this information back to Marty.  
9 *Id.* at 370.

10 According to Servin, between February 1st and 6th, Sharron approached him and stated  
11 “they” suspected Arellano, Charles Walker, and another employee named Rico were the three  
12 main people behind the union organizing effort. ECF No. 1-1 at 143. Sharron testified at the ALJ  
13 proceedings that he suspected Arellano was behind the union organizing effort and that Arellano  
14 told him before the election that Arellano supported the union. ECF No. 29-1 at 371. Although  
15 all of the engineers told Sharron they were voting no, the engineers voted in favor of the union.

16 Overstreet has shown a likelihood of success on these charges. Marty sent Sharron to  
17 investigate the union organizing effort, and Sharron later stated “they” knew who was behind it.  
18 The NLRB “has long held that, when, in comments to its employees, an employer specifically  
19 names other employees as having started a union movement or as being among the union leaders,  
20 the employer unlawfully creates the impression, in the minds of its employees, that he has been  
21 engaged in surveillance of his employees’ union activities.” *In Re Royal Manor Convalescent*  
22 *Hosp., Inc.*, 322 NLRB 354, 362 (1996).

23 Additionally, Overstreet has shown a likelihood of success related to Sharron’s  
24 questioning of Servin and Arellano. An employer has a First Amendment right to ask questions  
25 of and communicate with its employees about union matters “so long as the communications do  
26 not contain a threat of reprisal or force or promise of benefit.” *Westwood Health Care Ctr.*, 330  
27 NLRB 935, 947 (2000); *see also* 29 U.S.C. § 158(c) (providing that “[t]he expressing of any  
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1 views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . .  
2 if such expression contains no threat of reprisal or force or promise of benefit”). To determine  
3 the line between legitimate communications and unlawful coercion, the NLRB asks “whether  
4 under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere  
5 with rights guaranteed by the Act.” *Westwood Health Care Ctr.*, 330 NLRB at 948. Some factors  
6 that may be considered include (1) the background of hostility toward the union (or lack thereof);  
7 (2) the nature of the information sought; (3) the questioner’s identity; (4) the place, tone, duration,  
8 purpose, and method of questioning, and (5) whether the questioning is repeated. *Id.* These are  
9 not the only factors to consider and the ultimate question is “whether under all the circumstances  
10 the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the  
11 Act.” *Id.*

12       There is no evidence that anyone at Apex expressed hostility toward the union before  
13 Sharron made his statements. However, Sharron’s statements themselves appear hostile because  
14 he characterized it as the union “forcing” its way in, told Servin the union would do nothing but  
15 take his money, and told Arellano he did want the union and was going to call other employees to  
16 see where they stood. Within a day of the union’s petition, Sharron had questioned two different  
17 engineers and indicated he was going to question all of them about their union views. Sharron  
18 was a supervisory engineer and was sent by Marty to investigate the union organizing effort. It is  
19 unclear from the record what Sharron’s tone was, but apparently both Servin and Arellano felt  
20 intimidated enough to be circumspect in response to Sharron’s questions. Indeed, all of the  
21 engineers denied they were going to vote for the union, even though a majority of them later did.  
22 Overstreet thus has presented some evidence of coercive questioning.

23       Additionally, Overstreet presented evidence that Sharron commented that the union would  
24 do nothing but take Servin’s money. The NLRB has held that “comments designed to impress on  
25 the employees the futility of having selected the Union as their collective-bargaining  
26 representative” violate § 8(a)(1). *See Flamingo Hilton-Reno, Inc.*, 321 NLRB 409, 416 (1996).

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1 Consequently, Overstreet has shown a likelihood of success on these allegations by presenting  
2 some evidence and arguable legal theories.

### 3 *2. Dramise's Statements to Servin and Arellano*

4 About a week after Sharron spoke to Arellano and Servin about how they were going to  
5 vote, Sharron approached Servin and said that Dramise wanted to talk to Servin and Arellano.  
6 ECF No. 1-1 at 142; ECF No. 29-1 at 372 (Sharron testifying that Dramise requested the  
7 meeting). Dramise, Sharron, Servin, and Arellano met in the conference room. According to  
8 Servin, Dramise stated that if the union came in, he would no longer be able to honor contracts he  
9 had with the employees, including shifts, days off, and benefits. ECF Nos. 1-1 at 142, 150; 29-1  
10 at 496-97. Servin and Arellano were both hired on the condition that they had day shifts and  
11 weekends off. ECF No. 1-1 at 142-43. Sharron testified at the ALJ proceeding that Dramise told  
12 Arellano and Servin that if the union came in, there would be a new contract and Arellano and  
13 Servin's contracts would be null and void. ECF No. 29-1 at 373. This was the first time Arellano  
14 had ever met with Dramise even though he had been employed by Apex since 2011. ECF No. 29-  
15 1 at 496-97, 515.

16 Overstreet has shown a likelihood of success on this allegation. Three different witnesses  
17 testified that Dramise stated that if the union came in, he would no longer be able to honor  
18 contracts he had with the employees, including shifts, days off, and benefits. That suggested to  
19 Servin and Arellano that they would lose benefits if they voted for the union. Threatening loss of  
20 benefits if employees vote for the union interferes with their rights to proceed collectively. *See*  
21 *Longview Fibre Paper & Packaging, Inc.*, 356 NLRB 796, 803 (2011). Overstreet thus has  
22 presented some evidence and an arguable legal theory for this allegation.

### 23 *3. Arellano's Request for Union Representation*

24 On February 13th, Marty called Arellano into a conference room. ECF No. 1-1 at 159.  
25 Arellano sought to invoke his right to be represented by a union member during the meeting, but  
26 Marty responded that this right did not apply because Apex had already made its decision, and  
27 Arellano was terminated. *Id.* at 117, 159. Marty asked Arellano if he wanted to make a written  
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1 statement, but Arellano refused without a union representative present. *Id.* at 117-18, 159.

2 Arellano was then escorted off the property. *Id.* at 159-60.

3 Under *N.L.R.B. v. J. Weingarten, Inc.*, employees have the right under § 157 to have a  
4 union representative at any interview the employee reasonably fears might result in disciplinary  
5 action. 420 U.S. 251, 261 (1975). “[A]n employee has no Section 7 right to the presence of his  
6 union representative at a meeting with his employer held solely for the purpose of informing the  
7 employee of, and acting upon, a previously made disciplinary decision.” *Baton Rouge Water*  
8 *Works Co.*, 246 N.L.R.B. 995, 997 (1979). But this exception itself has an exception:

9 if the employer engages in any conduct beyond merely informing the employee of  
10 a previously made disciplinary decision, the full panoply of protections accorded  
11 the employee under *Weingarten* may be applicable. Thus, for example, were the  
12 employer to inform the employee of a disciplinary action and then seek facts or  
evidence in support of that action . . . , such conduct would remove the meeting  
from the narrow holding of the instant case, and the employee’s right to union  
representation would attach.

13 *Id.*

14 Arellano invoked his *Weingarten* rights and was denied. Although Marty testified that he  
15 had already decided to terminate Arellano, Marty also asked Arellano if he wanted to make a  
16 written statement. Overstreet thus has presented some evidence and an arguable legal theory that  
17 the meeting went beyond merely informing Arellano of his termination, but instead sought to  
18 obtain a written statement from him. *See El Paso Healthcare Sys., Ltd. d/b/a Las Palmas Med.*  
19 *Ctr. & Nat’l Nurses Org. Comm. - Texas/NNU*, 28-CA-23368, 2011 WL 4527336 (N.L.R.B.  
20 Sept. 29, 2011) (“[T]he Board has held that where an employer informs an employee of a  
21 disciplinary action and then questions the employee to seek information to bolster that decision,  
22 the employee’s right to representation applies.”).

### 23 **B. Section 8(a)(3)**

24 Section 8(a)(3) provides that it is an unfair labor practice for an employer “by  
25 discrimination in regard to . . . tenure of employment . . . to encourage or discourage membership  
26 in any labor organization.” 28 U.S.C. § 158(a)(3). “An employer violates Section 8(a)(3) when  
27 the employee’s involvement in a protected activity was a substantial or motivating factor in the  
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1 employer's decision to discipline or terminate the employee." *HTH Corp.*, 693 F.3d at 1062. The  
2 Regional Director bears the initial burden of "showing that the employee was engaged in  
3 protected activity, the employer knew of such activity, and the employer harbored anti-union  
4 animus." *Id.* If he does so, then "the burden shifts to the employer to demonstrate that it would  
5 have taken the same action regardless of the employee's union activity." *Id.* "An employer  
6 cannot prove this affirmative defense where its asserted reasons for a discharge are found to be  
7 pretextual." *United Nurses Ass'ns of Cal. v. Nat'l Labor Relations Bd.*, 871 F.3d 767, 779 (9th  
8 Cir. 2017) (quotation omitted).

9 *1. Arellano*

10 Overstreet has met his burden of showing a likelihood of success on the claim that Apex  
11 fired Arellano in retaliation for his union activities. Arellano was behind the initial unionization  
12 effort. Sharron stated that Arellano was suspected to be a main person behind it and that before  
13 the election, Arellano told Sharron that he supported the union. Additionally, Arellano wore a  
14 union button on the day of the election. ECF No. 29-1 at 504. Arellano thus engaged in protected  
15 conduct and Apex was aware of that conduct. There is some evidence that Apex harbored anti-  
16 union animus, as discussed above with respect to the statements made by Sharron and Dramise.

17 Apex contends it had a legitimate reason to fire Arellano because he encouraged another  
18 employee to make a false worker's compensation claim. Overstreet has presented some evidence  
19 that this reason is pretextual. Prior to the incident at issue, Marty considered Arellano a good and  
20 talented employee. *Id.* at 46. Arellano was fired despite having no history of discipline and  
21 without Marty interviewing either the complaining witness, Victoria Hernandez, or Arellano.  
22 ECF No. 1-1 at 106, 108-11. Instead, Marty took the word of Hernandez's supervisor, Cristina  
23 Linares, who relayed Hernandez's allegations to Marty. *Id.* at 107-08. Marty testified he did not  
24 speak to Hernandez because she speaks only Spanish. ECF No. 29-1 at 62. But he could have  
25 interviewed Hernandez through an interpreter.

26 A reasonable fact finder could question why the employer would not talk to the only two  
27 employees involved in the conversation before deciding to terminate an employee who otherwise  
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1 had no disciplinary issues. Upon questioning at the ALJ proceedings, Hernandez testified that her  
2 eye was not red before she came to work, it became irritated two or three hours after she started  
3 work, and once she informed Arellano that she did not think her eye injury occurred at work, the  
4 conversation ended. ECF No. 29-1 at 595-96, 605. Arellano denies that he encouraged  
5 Hernandez to commit fraud. ECF No. 1-1 at 158. Thus, had Marty interviewed the employees, he  
6 would have learned that Arellano did not continue to encourage Hernandez to make a worker's  
7 compensation claim even after learning that she did not believe the injury occurred at work.

8 Additionally, there is some evidence of shifting reasons for the firing. Arellano was  
9 accused of sabotaging equipment and his termination record states he was fired for  
10 "insubordination, dishonesty, [and] willful or careless destruction of company assets." ECF No.  
11 1-2 at 16. Marty testified at the ALJ proceeding that Arellano was not involved in damaging  
12 company equipment, that those allegations had nothing to do with his termination, and that the  
13 basis for the discharge was for allegedly encouraging the false worker's compensation claim.  
14 ECF No. 1-1 at 108, 112-14. Finally, the proximity in time between the union vote on February 6  
15 and Arellano's firing on February 13 supports a retaliatory motive. Overstreet thus has presented  
16 some evidence and an arguable legal theory for this charge.

## 17 2. *Charles Walker*

18 Walker was one of three individuals Sharron identified as being behind the union  
19 organizing effort. *Id.* at 143. Walker volunteered to observe the union election. ECF No. 1-2 at 3.  
20 On February 10, Marty told Ed Martin, the union bargaining representative, that Apex was  
21 contemplating a layoff because, among things,<sup>3</sup> it no longer needed a graveyard shift. ECF No.  
22 29-3 at 1. Marty identified potentially affected engineers as Walker, Jaime Valdovimos Magana,  
23 and Leonardo Porter. *Id.* at 1-2. On February 15, Sharron told Walker he was being laid off. ECF  
24 No. 1-2 at 3. According to Walker, during his termination meeting, Marty stated that Apex  
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27 <sup>3</sup> Marty also testified the layoff was due to reduced hours throughout the prior fall, so instead of  
28 continuing to reduce everyone's hours, Apex decided to lay off one employee. ECF No. 29-1 at 94-95,  
264.

1 “didn’t want the Union in, but of course that didn’t happen.” *Id.* at 48.<sup>4</sup> Walker avers that Marty  
2 said that the union had nothing to do with why Walker’s position was being eliminated and that  
3 Walker was subject to rehire. *Id.* Neither Valdovimos Magana nor Porter was laid off, even  
4 though they also worked a graveyard shift. ECF No. 29-1 at 92, 579-80. Walker was laid off  
5 because he was the last one hired. *Id.* at 92.

6 After the layoff, Marty approached the union about hiring additional engineers. *Id.* at 95.  
7 Ed asked Apex to rehire Walker, but Apex responded that Walker was not qualified to be a full  
8 engineer and Apex was not hiring utility engineers. ECF Nos. 1-1 at 122-23; 29-1 at 96-97. On  
9 October 25, Apex advised the union it intended to hire a utility engineer. ECF No. 1-2 at 82. Ed  
10 suggested Apex rehire Walker. *Id.* Apex hired two utility engineers, but not Walker. *Id.* Marty  
11 explained that Apex did not rehire Walker because the union wanted Walker rehired at his former  
12 hourly rate of \$25 per hour, but the new engineers would be hired at \$15 per hour. ECF No. 29-1  
13 at 210.

14 Overstreet has presented some evidence in support of this charge. Walker was a suspected  
15 union supporter who openly engaged in union support activity by observing the election. As  
16 already discussed, there is evidence of anti-union sentiment, and Walker avers that Marty made  
17 reference to the union during Walker’s layoff meeting.

18 Although Apex relies on a business need for the layoff, Apex has never provided the  
19 union with documentation showing that need. ECF No. 29-1 at 426-27. Additionally, although  
20 Marty said the graveyard shift was no longer necessary, he laid off only Walker and not the other  
21 two employees on the graveyard shift who had been identified for layoff. Given the reference to  
22 the union during the layoff meeting, Walker’s suspected and known union support, the proximity  
23 between the election and his layoff, and the later refusal to rehire Walker, Overstreet has met his  
24 burden of producing some evidence and an arguable legal theory in support of this charge.

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27 <sup>4</sup> Marty denied he mentioned the union during this meeting. ECF No. 29-1 at 588. However,  
28 conflicting evidence does not necessarily preclude a finding that Overstreet has shown a likelihood of  
success on the merits.

1                   3. *Servin*

2           Overstreet has presented some evidence that Servin was discharged for participation in  
3 union activities. Servin supported the union by wearing union buttons and putting a union sticker  
4 on his phone and toolbox. Overstreet has presented evidence Apex was aware of his conduct  
5 because he publicly displayed his union support and because Servin was identified as a union  
6 negotiator before he was fired. ECF Nos. 1-2 at 52; 29-1 at 538. As already discussed, there is  
7 evidence of anti-union sentiment.

8           Apex contends it fired Servin for legitimate reasons because Servin had numerous  
9 unexcused absences and he lied about the reasons for those absences. Additionally, Apex argues  
10 it had video surveillance showing Servin distributing union materials during work hours, which  
11 violates Apex's non-solicitation policy.

12           There is some evidence these reasons were pretextual. After Servin explained his absence  
13 related to his daughter going into false labor, he was not further counseled or disciplined on the  
14 matter. ECF No. 29-1 at 550. Additionally, Servin was disciplined for his absences April 27  
15 through May 2 even though he produced a doctor's note in support and was not told that his  
16 calling off work was improper. *Id.* at 552. Servin disputes that there was any change in his work  
17 performance and that any slowdown was due to understaffing after Apex fired Arellano and laid  
18 off Walker. *Id.* at 539-43. Finally, Servin states he has seen other employees regularly solicit in  
19 relation to non-union matters but those employees were not disciplined. ECF No. 1-2 at 73; *see*  
20 *also* ECF No. 29-1 at 336-37 (another employee testifying that candy bar sales occurred during  
21 work hours whenever someone came to the secretary's desk to buy some); *id.* at 520 (Arellano  
22 testifying he has seen other employees sell items at work). Although Marty claimed he did not  
23 know other employees were soliciting at work, he was aware that his secretary sold candy for  
24 fundraisers. ECF No. 29-1 at 116-18. Additionally, Keith Marsh, director of engineering,  
25 testified that if Servin had been handing out something other than union materials, he likely  
26 would not have been disciplined. *Id.* at 336.

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1 In sum, Overstreet has presented some evidence that Servin was discharged in retaliation  
2 for his union support given the disparity in treatment, the proximity in timing from the union vote  
3 in February, Arellano's termination in February, Walker's layoff in March, and then Servin's  
4 attempted discharge in April<sup>5</sup> and completed termination in May. These three were main union  
5 supporters and all were terminated within three months of the union vote.

6 **C. Section 8(a)(5)**

7 Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain  
8 collectively with the representatives of his employees, subject to the provisions of section 159(a)  
9 of this title." Section 159(a) provides that the selected representative "shall be the exclusive  
10 representative[] of all the employees in such unit for the purposes of collective bargaining in  
11 respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."  
12 Overstreet alleges three violations under this section: (1) Apex did not provide information that is  
13 relevant and necessary to the union's duties as the bargaining representative, (2) Apex instituted  
14 changes in employees' terms and conditions of employment without first bargaining (changing  
15 the lunchroom, changing schedules, and using third parties to do the engineers' work), and (3)  
16 Apex failed to bargain in good faith by not making proposals or counterproposals and failed to  
17 provide a representative with authority to enter into agreements on Apex's behalf.

18 *1. Providing Information*

19 Overstreet has narrowed this claim to the failure to provide the following categories of  
20 information: (1) a list of current bargaining unit employees including their date of completion of  
21 any probationary period; (2) copies of all manuals, training materials, policies, and procedures  
22 currently in use and a copy of Arellano's training records; (3) a list of employees who have had  
23 schedule changes, including dates and job classifications at the time of the changes; (4) copies of  
24 Arellano's employee evaluations and all evidence used in the decision to terminate Arellano; and  
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26 <sup>5</sup> Marty decided to terminate Servin after he observed Servin taking pictures in the plant. That  
27 decision was rescinded after Servin explained he was taking photographs of a thermometer showing how  
28 hot some laundered sheets were, and he showed Marty and Dramise that he sent the photograph to another  
engineer at Apex. ECF Nos. 1-2 at 52-53; 29-1 at 103-07.

1 (5) information related to what was behind the layoff and change in employees' schedules,  
2 evidence of the business need that required these actions, and copies of subcontractor AJ  
3 Industries' invoices for the past five years. Overstreet provides a viable legal theory for these  
4 alleged unfair practices because "[a]s part of its duty to bargain in good faith, an employer must  
5 provide the union with information that is relevant and necessary to bargaining." *HTH Corp.*, 693  
6 F.3d at 1064 (giving the example that if the "employer justifies its bargaining position during  
7 negotiations on an inability to pay, this entitles the union to request financial documents sufficient  
8 to substantiate the employer's position").

9 a. Current bargaining unit employees' probationary period

10 The union requested this material in February 2017. ECF No. 29-4 at 4. At the ALJ  
11 proceeding, Marty testified that Apex does not have records showing when each engineer passed  
12 probation. ECF No. 29-1 at 149. Apex never informed the union that it does not have records  
13 showing that information. *Id.* at 149-50. The union is now aware of this fact. *Id.* at 418, 421. It is  
14 unclear what injunctive relief Overstreet seeks in relation to this allegation because apparently  
15 there are no records to produce. I therefore do not address this allegation.

16 b. Policies and procedures and Arellano's training records

17 The union requested this material in February 2017. ECF Nos. 29-3 at 8; 29-4 at 4. Marty  
18 responded that the training and equipment manuals are too voluminous to provide copies and he  
19 provided only the employee handbook. ECF No. 29-4 at 8. Apex never offered alternative means  
20 to view these materials. ECF No. 29-1 at 150. According to Marty, the union did not ask for  
21 alternative means to view the materials, although he admitted the union requested access to the  
22 facility and Apex denied that request. *Id.* It is unclear from the record whether this request was  
23 directed at viewing these materials or was for another purpose. Apex has not provided copies of  
24 sign off sheets for equipment training and it has not provided the company's health insurance  
25 plans. *Id.* at 151-52, 421-22.

26 As for Arellano's training records, Apex did not provide any training records to the union.  
27 *Id.* at 156, 220-21. Marty testified he did not produce training records because he believed they  
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1 did not exist. *Id.* Marty testified he since has found out that Apex does have training records,  
2 although he is unsure the extent of those records. *Id.* Marty did not tell Ed that records do exist  
3 because the union never raised the topic of training records again after its initial request in  
4 February. *Id.* at 157-58, 223.

5 Overstreet has presented some evidence that the union requested these materials, Apex did  
6 not provide them, and Apex did not provide alternative means to view the materials, including  
7 denying a union request to visit the facility. The fact that the union did not repeat some of its  
8 requests does not absolve Apex of its responsibility to provide the information. *See Aero-Motive*  
9 *Mfg. Co.*, 195 NLRB 790, 792 (1972) (“If the Union was entitled to the information at the time it  
10 made the request, then Respondent was obligated to furnish it and there is no obligation of the  
11 Union to repeat such a request any given number of times.”). These records are relevant to the  
12 union’s bargaining responsibilities. ECF No. 29-1 at 422-23. Overstreet therefore has shown a  
13 likelihood of success on this charge.

14 c. Schedule change information

15 The union requested this material in February 2017. ECF No. 29-4 at 6. Apex responded  
16 by providing employee time cards because Apex did not specifically keep records regarding  
17 schedule changes. ECF No. 29-1 at 178, 421. Ed was not able to determine schedule changes  
18 from the timecards. *Id.* at 274, 421. It is unclear what injunctive relief Overstreet seeks in relation  
19 to this allegation because apparently there are no records to produce that would show schedule  
20 changes. I therefore do not address this charge.

21 d. Arellano’s evaluations and evidence used in termination decision

22 In February 2017, the union requested Hernandez’s statement, Arellano’s evaluations, and  
23 copies of all evidence, such as video and audio recordings, used in the termination decision. ECF  
24 No. 29-3 at 4, 8. Apex did not provide Hernandez’s statement. ECF No. 29-1 at 420. Instead, Ed  
25 obtained a copy from Arellano. *Id.* Apex also did not provide the video surveillance of Arellano  
26 and Hernandez talking. *Id.* at 420. Overstreet therefore has presented some evidence that the  
27 union requested this information and Apex did not provide it. This information is relevant to the  
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1 union's ability to negotiate over Arellano's termination. *Id.* at 425-26. Overstreet thus has shown  
2 a likelihood of success on the merits of this charge.

3 e. Information related to the layoff and schedule change/AJ invoices

4 The union requested this information in February 2017. ECF No. 29-3 at 5, 7. Apex did  
5 not provide any information in response. ECF No. 29-1 at 426-27. This information was relevant  
6 to the union's ability to evaluate Apex's decision to lay off Walker, change the other employees'  
7 schedules, and to allegedly use AJ Industries employees instead. *Id.* at 425-27. Overstreet thus  
8 has shown a likelihood of success on the merits of this charge.

9 2. Instituting Changes

10 Overstreet has presented viable legal theories for these alleged unfair practices because  
11 the employer cannot bypass the union and deal directly with employees on terms and conditions  
12 of employment. *See N.L.R.B. v. Katz*, 369 U.S. 736, 743 (1962). Additionally, "[s]ection 8(a)(5)  
13 requires employers to refrain from making a change in mandatory bargaining subjects unless the  
14 change is preceded by notice to the union and the opportunity for bargaining regarding the  
15 planned change." *Raytheon Network Centric Sys.*, 365 NLRB No. 161, 2017 WL 6507215 (Dec.  
16 15, 2017) (emphasis omitted).

17 a. Schedule Changes

18 Apex does not dispute that it made schedule changes without consulting with the union.  
19 *See* ECF No. 29-1 at 176-83, 242, 249-50, 432-34. However, Apex contends that it is merely  
20 following its status quo policy of approving schedule changes on an ad hoc basis when employees  
21 request it, which it is allowed to do under *Raytheon* because that does not constitute a change in a  
22 mandatory subject of bargaining. There was testimony at the ALJ proceeding that Apex's past  
23 practice has been to let engineers work out schedule changes amongst themselves and then  
24 request Sharron and Marty approve those changes. *Id.* at 242, 249-250.

25 An employer does not violate Section 8(a)(5) if its unilateral action does not change  
26 existing conditions. *Raytheon*, 2017 WL 6507215, at \*7. "An established past practice can  
27 become part of the status quo." *Id.* (quotation omitted). Thus, an employer does not engage in an  
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1 unfair practice by “simply follow[ing] a well-established past practice.” *Id.* (quotation omitted).  
2 To determine whether the employer has made a unilateral change or instead is following a past  
3 practice, the inquiry is whether the employer made “a substantial departure from past practice”  
4 that “materially varied in kind or degree from what had been customary in the past.” *Id.* at \*8-9  
5 (quotations omitted). Thus, “regardless of the circumstances under which a past practice  
6 developed--i.e., whether or not the past practice developed under a collective-bargaining  
7 agreement containing a management-rights clause authorizing unilateral employer action--an  
8 employer’s past practice constitutes a term and condition of employment that permits the  
9 employer to take actions unilaterally that do not materially vary in kind or degree from what has  
10 been customary in the past.” *Id.* at \*21.

11 Overstreet has not shown a likelihood of success on the merits of this allegation to the  
12 extent it rests on the consensual schedule swaps between employees. The evidence shows these  
13 changes followed the employer’s past practice of allowing its engineers to adjust their schedules  
14 amongst themselves, subject to approval by Sharron and Marty. Thus, Apex did not change the  
15 status quo by approving the schedule changes.

16 However, this theory does not apply to Apex’s unilateral change of all engineers’  
17 schedules in conjunction with Walker’s layoff. That change did not come about as a result of past  
18 practice of the employees negotiating schedule changes amongst themselves. Instead, it was a  
19 new schedule imposed by Apex on all engineers. Overstreet has shown a likelihood of success on  
20 the merits of this claim because Apex imposed the new schedule and layoff without providing  
21 information to the union showing the business need for these actions and without first bargaining  
22 over the changes.

23 b. AJ Industries

24 AJ Industries is a subcontractor owned by Dramise that does laundry equipment service  
25 and installation at Apex (and for other businesses). ECF No. 29-1 at 185. AJ employees perform  
26 installation, service, and maintenance work at Apex. *Id.* Apex typically uses AJ employees for

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1 capital projects, installation, and special projects. *Id.* at 186. AJ employees also occasionally  
2 perform overflow work when Apex engineers are too busy. *Id.* at 277-78.

3 Servin avers that after Arellano and Walker were terminated, he saw AJ employees  
4 working in the plant more often than before. ECF No. 1-2 at 56. Although Servin admitted that  
5 Apex regularly would use AJ employees when it was busy at the plant, he testified that after  
6 Arellano was fired, Apex brought in an AJ employee to cover Arellano's shift for a week. ECF  
7 No. 29-1 at 566. Servin testified this was a different use of AJ employees because they had not  
8 covered an entire shift before. *Id.* at 567.

9 AJ Industries' invoices dated the week after Arellano was fired show AJ employees did  
10 work that Apex engineers normally would perform, including cleaning up the shop and fixing a  
11 leak on a dryer. *Id.* at 276-78, 399-400; ECF No. 29-11 at 10. Other invoices mentioned  
12 miscellaneous work that same week. ECF No. 29-11 at 12-13. Marty characterized that work as  
13 overflow, which, as Servin testified, was consistent with past practice of using AJ employees  
14 when it was busy. ECF No. 29-1 at 277.

15 Overstreet has shown a likelihood of success on this claim, although it is not a strong  
16 showing. The evidence shows the employer's past practice was to use AJ employees to perform  
17 overflow work, meaning AJ employees would perform work normally performed by bargaining  
18 unit employees when it was busy at the plant. However, Servin's testimony is some evidence that  
19 Apex used AJ employees in a way that varied in kind and degree from past practice because an  
20 AJ employee covered an engineer's entire shift. AJ's invoices from the week following  
21 Arellano's termination show AJ charged for many hours for work bargaining unit employees  
22 normally would perform or that was described as "miscellaneous." Additionally, Apex did not  
23 provide the union with AJ's invoices despite the union's request for that information. A  
24 reasonable inference from Apex's conduct is that it did not want the union to see it used AJ  
25 employees to perform bargaining unit work.

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1                                    c. Break Room

2                    Overstreet has shown a likelihood of success on this charge, but it is not a strong showing.  
3                    There was testimony that the engineers used a particular room known as the parts room as an  
4                    unofficial break room. *Id.* at 172. According to Marty, Apex had planned to turn the room into a  
5                    parts room and require all employees to use the newly renovated official break room before Apex  
6                    even knew about a union organizing effort. *Id.* at 162, 165. Marty also testified this plan was  
7                    communicated to engineers at a January 11th meeting. *Id.* at 237; *see also* ECF No. 30-2 at 112  
8                    (notes from January 11th meeting stating “lunch room – remove”). Dramise likewise testified  
9                    that the engineers were told about the planned conversion to a parts room before the union came  
10                   in. ECF No. 29-1 at 329-60.

11                   Although the official break room was finished in December 2016, Marty testified the parts  
12                   room was not closed as a break room until early February because Apex did not have the shelving  
13                   to convert it into a parts room, so it had no need to use the room until then. *Id.* at 171-72. Marty  
14                   testified Apex eliminated other small break rooms around this same time, but when Ed visited the  
15                   facility he was shown a break room used by dry cleaning employees. *Id.* at 173-74, 430. Arellano  
16                   testified the break room was closed the day after the union election, and he had no prior notice of  
17                   a plan to convert it to a parts room. *Id.* at 518; *see also id.* at 171, 560 (Servin testifying that the  
18                   day after election, the table and chairs in the room, which belonged to Dramise, were removed  
19                   and a message was left on a white board to use the main break room). Overstreet thus has  
20                   presented some evidence that Apex made the decision to convert the break room into a parts room  
21                   only after the union election.

22                                    *3. Refusing to Bargain in Good Faith*

23                   Overstreet identifies two unfair practices under this category: (1) failing to bargain in  
24                   good faith by not making proposals or counterproposals and (2) failing to provide a representative  
25                   with authority to enter into agreements on Apex’s behalf. Overstreet has presented evidence and  
26                   a viable legal theory in support of the allegation that Apex did not make proposals and  
27                   counterproposals. Although the NLRA does not require the parties to reach an agreement, the  
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1 parties must “participate actively in the deliberations so as to indicate a present intention to find a  
2 basis for agreement, and a sincere effort must be made to reach a common ground.” *N.L.R.B. v.*  
3 *Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943). Merely attending bargaining  
4 sessions “with a completely closed mind and without this spirit of co-operation and good faith is  
5 not a fulfillment of this duty.” *Id.* “While the Act places upon the employees the burden of  
6 instituting the bargaining proceedings and no burden in this respect upon the employer, it is not  
7 incumbent upon the employees continually to present new contracts until ultimately one meets the  
8 approval of the company.” *Id.* at 687.

9 The union presented a proposal to Marty on April 27. ECF No. 1-2 at 86. Some sections  
10 of the proposal were incomplete because, according to Ed, the union had not received certain  
11 information from Apex, such as wage rates and health insurance, to fill those sections out. *Id.* Ed  
12 met with Marty and started to go over the proposal section by section. *Id.* Marty stated it was  
13 taking too long and he could not discuss the contract until there was a complete proposal. *Id.* He  
14 also requested an electronic version of the proposal. *Id.* Ed sent him a PDF version shortly  
15 thereafter. *Id.*

16 On May 23, Ed delivered a physical copy of a proposal including the economic package  
17 numbers that were left blank the last time (except for some sections where Apex had not provided  
18 information to the union, such as benefits plan information). *Id.* Ed requested written  
19 counterproposals. *Id.* Marty requested a Word version of the document so he could do a redline  
20 response. *Id.* at 87. Ed refused, saying he had already provided it in PDF format. *Id.*

21 Ed and Marty met again on July 11. *Id.* at 87. Ed asked if Marty had any proposals on the  
22 agreement. *Id.* Marty said he did not because Ed had not sent a Word version. *Id.* When Ed said  
23 he was not going to send a Word version, Marty indicated he would get it typed up and get back  
24 to the union. *Id.*

25 The parties met on July 18. According to Ed, Marty went through the union’s proposals  
26 stating he disagreed, disagreed with part, or could never agree to the union’s proposals, but  
27 offered no counterproposals. *Id.* at 109. Ed asked if they could tentatively agree on those parts  
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1 that Marty did agree with and set those parts aside so they could focus on the disagreements. *Id.*  
2 at 109-110. According to Ed, Marty said he did not have authority to agree to anything himself  
3 and that he had to take it back to Apex's board for approval. *Id.*

4 They met again on July 25 and Ed asked Marty if he had any counterproposals or whether  
5 he was willing to tentatively agree to any proposals. ECF No. 1-2 at 109-10. Marty stated he  
6 could negotiate but he would have to take it to Apex's board to approve. *Id.* Marty refused to  
7 agree to various proposals and made no counterproposals. *Id.* Marty provided a written document  
8 to the union on July 26. ECF Nos. 29-1 at 199; 29-11 at 1-6. In that document, Marty identified  
9 sections of the union's proposal that Apex could not agree to and that were "not acceptable." ECF  
10 No. 29-11 at 1-6. Most of the items identified were rejected outright as unacceptable, with no  
11 counterproposal. *Id.*

12 They met again on September 8 and Ed asked if Apex had counterproposals. ECF No. 1-2  
13 at 81, 85-86. Marty responded that Apex had turned negotiations over to its lawyers and they  
14 would get back to the union. *Id.* As of November 14, Apex had not made any counterproposals to  
15 the union. *Id.* at 82-83. Apex finally offered a counterproposal on December 1. ECF No. 11-5 at  
16 174-95.

17 Overstreet has presented some evidence of a lack of good faith bargaining on Apex's part.  
18 Apex's reliance on the fact that Ed would not provide a Word version of the union's proposal as  
19 the reason Apex did not offer counterproposals is unconvincing. While Ed's refusal is  
20 perplexing, once Apex knew that was Ed's position, it should have promptly either retyped the  
21 document, converted the PDF version into Word, or simply made physical redlines on a hard  
22 copy. There is no explanation for why that would take months to accomplish. Although Marty  
23 met with Ed many times, at none of these meetings did Marty agree to any terms or offer  
24 counterproposals. Instead, he stated that the company would not agree to union proposals without  
25 suggesting alternatives. Nor would he tentatively agree to those portions where there was no  
26 disagreement. While the Act does not require Apex to agree to the union's terms, it requires more  
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1 than meeting with the union with a closed mind, unwilling to do anything but decline the union's  
2 proposals.

3       However, Overstreet has not shown a likelihood of success on the allegation that Apex did  
4 not provide a negotiator with authority to bargain. "The duty to bargain includes the obligation to  
5 appoint a negotiator with real authority to negotiate and carry on meaningful bargaining regarding  
6 fundamental issues." *Wycoff Steel*, 303 NLRB 517, 525 (1991). "[A]n employer is not required to  
7 be represented by an individual possessing final authority to enter into an agreement," so long as  
8 that "does not act to inhibit the progress of negotiations." *Id.* "The degree of authority possessed  
9 by the negotiator is a factor which may be considered in determining good-faith bargaining." *Id.*

10       Marty is an owner and chief operating officer of Apex. ECF No. 11-2 at 1. He was the  
11 appointed negotiator and the union continued to negotiate with him even after he told the union  
12 that he would have to get final approval from Apex's board. He also relayed Apex's December 1  
13 counterproposal, thus suggesting he has authority to communicate on Apex's behalf regarding  
14 bargaining. Both Marty and Dramise testified Marty has authority to bargain. ECF No. 29-1 at  
15 205-06, 358. Overstreet therefore has not shown a likelihood of success on this charge.

## 16 **II. Irreparable Harm**

17       A preliminary injunction may not be entered "based only on a possibility of irreparable  
18 harm." *Operative Plasterers' and Cement Masons' Int'l Ass'n*, 611 F.3d at 490-91. Instead, the  
19 party seeking relief must show irreparable harm is likely in the absence of preliminary relief. *Id.*  
20 "[P]ermit[ing an] allegedly unfair labor practice to reach fruition and thereby render meaningless  
21 the Board's remedial authority is irreparable harm." *Avanti Health Sys., LLC*, 661 F.3d at 1191  
22 (quotation omitted). Additionally, "[f]ailure to bargain in good faith[ ] has long been understood  
23 as likely causing an irreparable injury to union representation." *HTH Corp.*, 650 F.3d at 1362.

24       By refusing to negotiate in good faith, Apex has successfully thwarted any union  
25 agreement for nearly a year, thus undermining the union's effectiveness and denying the  
26 employees their right to bargain collectively. This is a recognized irreparable harm. By failing to  
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1 provide requested information, Apex also has undermined the union's ability to effectively  
2 negotiate on subjects of mandatory bargaining.

3 Further, Overstreet has presented evidence of a likelihood of irreparable harm related to  
4 the termination of Arellano, Walker, and Servin. Within three months of the union vote, Apex  
5 ousted three of the top union organizers. According to Ed, after Servin was fired no employee  
6 would agree to serve on the negotiation committee for the union. ECF No. 1-2 at 113-14. Ed also  
7 avers that one employee stated he did not want to lose his job and he was done with the union,  
8 while another stated this was not what he signed up for and asked what the employees could do to  
9 stop it. *Id.* at 114. Although these are hearsay statements, I may consider hearsay at the injunctive  
10 relief stage. *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009). Given that this is the  
11 first time these employees have been represented by a union at Apex, the union's perceived  
12 ineffectiveness in remedying actions taken against bargaining unit members would erode  
13 confidence even more than an established union.

### 14 **III. Balance of the Hardships**

15 Apex is already compelled by law to bargain in good faith and to provide relevant  
16 information the union requests, so an injunction requiring it to do so would not burden it. A  
17 mandate to offer to rehire Arellano, Walker, and Servin may impose some burden on Apex  
18 although Apex does not present evidence that it could not afford to rehire them. Additionally, "to  
19 the extent [Apex] has hired new workers, the rights of the employees who were discriminatorily  
20 discharged are superior to the rights of those whom the employer hired to take their places."  
21 *Aguayo for & on Behalf of N.L.R.B. v. Tomco Carburetor Co.*, 853 F.2d 744, 750 (9th Cir. 1988),  
22 *overruled on other grounds by Miller for & on Behalf of N.L.R.B. v. Cal. Pac. Med. Ctr.*, 19 F.3d  
23 449 (9th Cir. 1994). The harm to the union and the discharged employees outweighs the harm to  
24 Apex.

### 25 **IV. Public Interest**

26 Because Overstreet has shown a likelihood of success, the public interest favors injunctive  
27 relief to support the public policies underlying the NLRA and to fulfill § 10(j)'s purpose, which is  
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1 to prevent an unfair labor practice from being successful due to the delay in the Board's  
2 adjudication of unfair practice charges.

### 3 **V. Unclean Hands and Delay**

4 I have considered Apex's argument that I should deny injunctive relief because the union  
5 has also engaged in bad faith bargaining tactics, and the union's unclean hands should be imputed  
6 to Overstreet because he seeks relief on the union's behalf. The Act gives authority to the Board  
7 to seek injunctive relief, and "the underlying purpose of Section 10(j) is to protect the integrity of  
8 the collective bargaining process and to preserve the Board's remedial power while it processes  
9 the charge." *McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 957 (9th Cir. 2010) (quotation  
10 omitted). Consequently, the Board has its own interests, independent of the union, that it seeks to  
11 vindicate through the requested injunctive relief. I therefore do not impute the union's alleged  
12 unclean hands to Overstreet.

13 I have also considered Apex's argument that Overstreet unduly delayed seeking injunctive  
14 relief. Delay is a factor to consider in determining whether and what relief is just and appropriate.  
15 But "[d]elay by itself is not a determinative factor in whether the grant of interim relief is just and  
16 proper." *Aguayo*, 853 F.2d at 750. The Board "needs a reasonable period of time to investigate  
17 and deliberate before it decides to bring a section 10(j) action." *Id.* Consequently, delay is  
18 significant only "if the harm has occurred and the parties cannot be returned to the status quo or if  
19 the Board's final order is likely to be as effective as an order for interim relief." *Id.* That is not  
20 the case here.

### 21 **VI. Relief**

22 Overstreet has shown a likelihood of success on the merits, a likelihood of irreparable  
23 injury, and that the balance of hardships and the public interest favor injunctive relief. I therefore  
24 consider what relief is just and proper under the circumstances. 29 U.S.C. § 160(j).

25 An injunction may be prohibitory or mandatory. A "prohibitory injunction prohibits a  
26 party from taking action and preserve[s] the status quo pending a determination of the action on  
27 the merits." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79  
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1 (9th Cir. 2009) (quotation omitted). In contrast, a “mandatory injunction orders a responsible  
2 party to take action.” *Id.* (quotation omitted). “A mandatory injunction goes well beyond simply  
3 maintaining the status quo [p]endente lite [and] is particularly disfavored.” *Id.* (quotation  
4 omitted). Generally, a court should not grant a mandatory injunction “unless extreme or very  
5 serious damage will result.” *Id.* (quotation omitted). A mandatory injunction is “not issued in  
6 doubtful cases or where the injury complained of is capable of compensation in damages.” *Id.*  
7 (quotation omitted).

8 Overstreet requests both prohibitory and mandatory relief. I deny Overstreet’s request  
9 that I enjoin Apex from informing employees it would be futile to select the union as their  
10 representative and threatening reprisals if they select the union. The employees have already  
11 voted and selected the union. This requested relief is therefore moot.

12 I grant Overstreet’s requested relief that Apex be enjoined from: (1) interrogating  
13 employees about their union activities, (2) creating the impression that employees’ union  
14 activities are being surveilled, (3) discriminating against employees because of union support, (4)  
15 making changes in the terms and conditions of employment without notice to or bargaining with  
16 the union where that change varies in kind or degree from Apex’s past practices, (5) failing to  
17 give the union requested information that is necessary to the union’s representation of the unit,  
18 and (6) failing to bargain in good faith. These requests are supported by the evidence and require  
19 only that Apex do what it is already obligated to do.

20 I also grant a mandatory injunction requiring Apex to: (1) offer to re-hire Arellano,  
21 Walker, and Servin, (2) bargain in good faith with the union by meeting and negotiating in good  
22 faith, and (3) provide to the union requested information. Apex is already obligated to bargain in  
23 good faith and to provide relevant requested information. As for the discharged employees,  
24 ordering an offer to re-hire is necessary to remedy the irreparable harm to this newly certified  
25 union, particularly considering that a final Board decision may be months, if not years, away.  
26 Even if the employees already have other jobs, an order requiring Apex to offer re-hire will signal  
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1 to other employees that Apex cannot effectively get away with retaliatory discharges due to the  
2 length of time it takes for the Board to resolve unfair labor practice charges.

3 Additionally, I grant a mandatory injunction requiring Apex to (1) post copies of this  
4 order at the workplace and allow the NLRB access to the workplace to monitor that this has been  
5 done, (2) hold a mandatory meeting at which portions of the court's order (as set forth below) will  
6 be read aloud to bargaining unit employees, and (3) submit an affidavit saying these things have  
7 been done. The Ninth Circuit has approved the remedy of a mandatory meeting to read a Board  
8 order to employees. *United Nurses Ass'ns of Cal.*, 871 F.3d at 788-89. The Ninth Circuit rejected  
9 the argument that a reading was "an extraordinary remedy." *Id.* Rather, the court characterized it  
10 as "an effective but moderate way to let in a warming wind of information and, more important,  
11 reassurance." *Id.* (quotation omitted). In *United Nurses*, the Ninth Circuit concluded a reading  
12 order "was clearly warranted in light of [the employer's] several unfair labor practices, including  
13 its retaliatory firing of a prominent Union supporter." *Id.* Thus, although a reading order is in a  
14 sense mandatory injunctive relief, it is not particularly burdensome and is meant to remedy the  
15 harm caused by the unfair labor practices in undermining employee confidence in the union.

16 I deny Overstreet's request that Apex purge the discharged employees' files. Such interim  
17 relief is unnecessary. The Board will resolve whether the employees were discharged in  
18 retaliation for their union activities or were properly discharged for misconduct or as part of a  
19 valid layoff. Purging the files now is premature, especially if the Board finds the discharges were  
20 justified. Additionally, I deny the request to reopen the break room. Given the relatively weak  
21 showing on the merits on this charge and the availability of a newly renovated break room, I do  
22 not find interim injunctive relief just and proper under the circumstances.

23 Finally, I deny the requested relief regarding AJ Industries. Even if Apex used AJ  
24 employees inappropriately, and thus engaged in an unfair labor practice, the evidence was limited  
25 to a single week in February just after Arellano was terminated. There is no evidence Apex  
26 continued, or will continue in the future, to use AJ employees to perform bargaining unit work  
27 beyond its past practice of using AJ for overflow work.  
28

1 **V. Conclusion**

2 IT IS THEREFORE ORDERED that petitioner Cornele Overstreet's petition for  
3 temporary injunction (ECF No. 1) is **GRANTED in part**.

4 IT IS FURTHER ORDERED that, pending the underlying administrative proceedings  
5 before the Board, respondent Apex Linen Service, Inc. is hereby **RESTRAINED AND**  
6 **ENJOINED** from:

- 7 1. Interrogating employees about their union support and activities;
- 8 2. Creating the impression among employees that their union activities are under  
9 surveillance;
- 10 3. Discriminating against its employees in regard to hire or tenure of employment or  
11 any term or condition of employment, by conduct including but not limited to discharging its  
12 employees because its employees engaged in activities in support of the union, and in order to  
13 discourage membership in the union or in any other labor organization;
- 14 4. Making changes in the terms and conditions of employment of employees in the  
15 following appropriate collective-bargaining unit (the Unit) without notice to or bargaining with  
16 the Union as the collective-bargaining representative of the Unit:  
17 All full-time, regular part-time, and extra board Engineers and Utility Engineers  
18 employed by the Employer at its facility located in Las Vegas, Nevada; excluding,  
19 all other employees, office clerical employees, guards, and supervisors as defined  
in the Act.
- 20 5. Failing and refusing to provide information requested by the union that is  
21 necessary for and relevant to the Union's representation of the Unit; and
- 22 6. Failing and refusing to bargain in good faith with the union as the representative of  
23 the Unit, including by refusing to make proposals and counter-proposals in collective-bargaining  
24 negotiations.

25 IT IS FURTHER ORDERED that respondent Apex Linen Service Inc. shall:

- 26 A. Within ten (10) days of this Order, offer Adam Arellano, Charles Walker, and  
27 Joseph Servin, in writing, immediate reinstatement to their former jobs, or if those jobs no longer  
28

1 exist, to substantially equivalent positions of employment, without prejudice to their seniority and  
2 other rights and privileges previously enjoyed, displacing if necessary any workers hired or  
3 transferred to replace them.

4 B. Within fifteen (15) days of this Order, provide to the union the categories of  
5 information identified in this order that remain outstanding, or to make good faith efforts at  
6 reaching a mutually agreeable date, time, and location for the union to view such materials if they  
7 are too voluminous to provide copies.

8 C. Within fifteen (15) days of this Order, post copies of this Order, as well as  
9 translations of this Order provided by the Regional Director of the Board in English and Spanish,  
10 at Respondent's facility located at 6375 South Arville Street, Las Vegas, Nevada, in all places  
11 where notices to its employees are normally posted; maintain these postings during the pendency  
12 of the Board's administrative proceeding free from all obstructions and defacements; grant all  
13 employees free and unrestricted access to said postings; and grant to agents of the Board  
14 reasonable access to its facilities to monitor compliance with this posting requirement.

15 D. Within twenty (20) days of the Court's issuance of this Order, hold a mandatory  
16 meeting or meetings during working time at Respondent's facility located at 6375 South Arville  
17 Street, Las Vegas, Nevada, at which the following portions of this Order are to be read aloud:  
18 page 1 line 1 through page 3 line 4; page 24 lines 21 – 24; page 27 line 1 through the end of the  
19 Order. Those portions are to be read aloud by a responsible management official in the presence  
20 of an agent of the Board, or at Respondent's option by an agent of the Board in that official's  
21 presence, in English and Spanish. It shall be read aloud to all employees in the identified  
22 bargaining unit employed at Respondent's facility located at 6375 South Arville Street, Las  
23 Vegas, Nevada, including at multiple meetings as necessary to ensure that the Order is read aloud  
24 to all bargaining unit employees.<sup>6</sup> The employees also shall be told that the court's findings are  
25 set out in full in this Order, which they can read in the posted copies.

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26  
27 <sup>6</sup> If the employees in the identified bargaining unit work on different shifts, Apex shall hold a  
28 sufficient number of meetings to accommodate those different schedules.

1 E. Within thirty (30) days of this Order, file with the Court, and submit a copy to the  
2 Regional Director for Region 28 of the Board, a sworn affidavit from a responsible agent of  
3 Respondent stating, with specificity, the manner in which Respondent has complied with the  
4 above terms of the Injunction Order. And,

5 F. Within fifteen (15) days of receiving the union's response to Apex's December 1st  
6 counterproposal,<sup>7</sup> respond in writing to the union, with a copy to Petitioner, with details as to  
7 what Apex agrees to, what it does not, why, and with reasonable proposed alternatives where  
8 there is disagreement. This process shall repeat upon the union presenting a written counter-offer  
9 to Apex. The union and Apex may jointly agree to extend the fifteen-day deadline at any time if  
10 they agree no report is necessary at any particular point in the negotiations (i.e., the negotiations  
11 are progressing such that a report is unnecessary). If the union requests a face-to-face bargaining  
12 session, Apex must attend and negotiate in good faith to either reach agreement or bargain to  
13 good faith impasse. If Apex refuses to attend or continue a face-to-face bargaining session, it  
14 must submit a report to Petitioner within fifteen days of that action explaining why it ceased  
15 participating.

16 DATED this 12th day of February, 2018.

17   
18 \_\_\_\_\_  
19 ANDREW P. GORDON  
20 UNITED STATES DISTRICT JUDGE  
21  
22  
23  
24

25 \_\_\_\_\_  
26 <sup>7</sup> According to Marty's affidavit attached to Apex's supplemental brief, the union has not  
27 responded to Apex's December 1 counterproposal. ECF No. 30-1 at 3. If the union believes it has  
28 responded, it should re-send its response, with a copy to Petitioner. Apex's obligations under paragraph F  
of this temporary injunction are not triggered until the union responds to Apex's December 1  
counterproposal.